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In the
Supreme Court of the United States

October Term, 1945

No. 952

BERTHA FLORENCE SABIN AND M. R. SABIN,
Petitioners,

VERSUS

HOME OWNERS' LOAN CORPORATION, A CORPORATION,
GEORGE J. OVERMYER AND BRENDA E. OVERMYER.

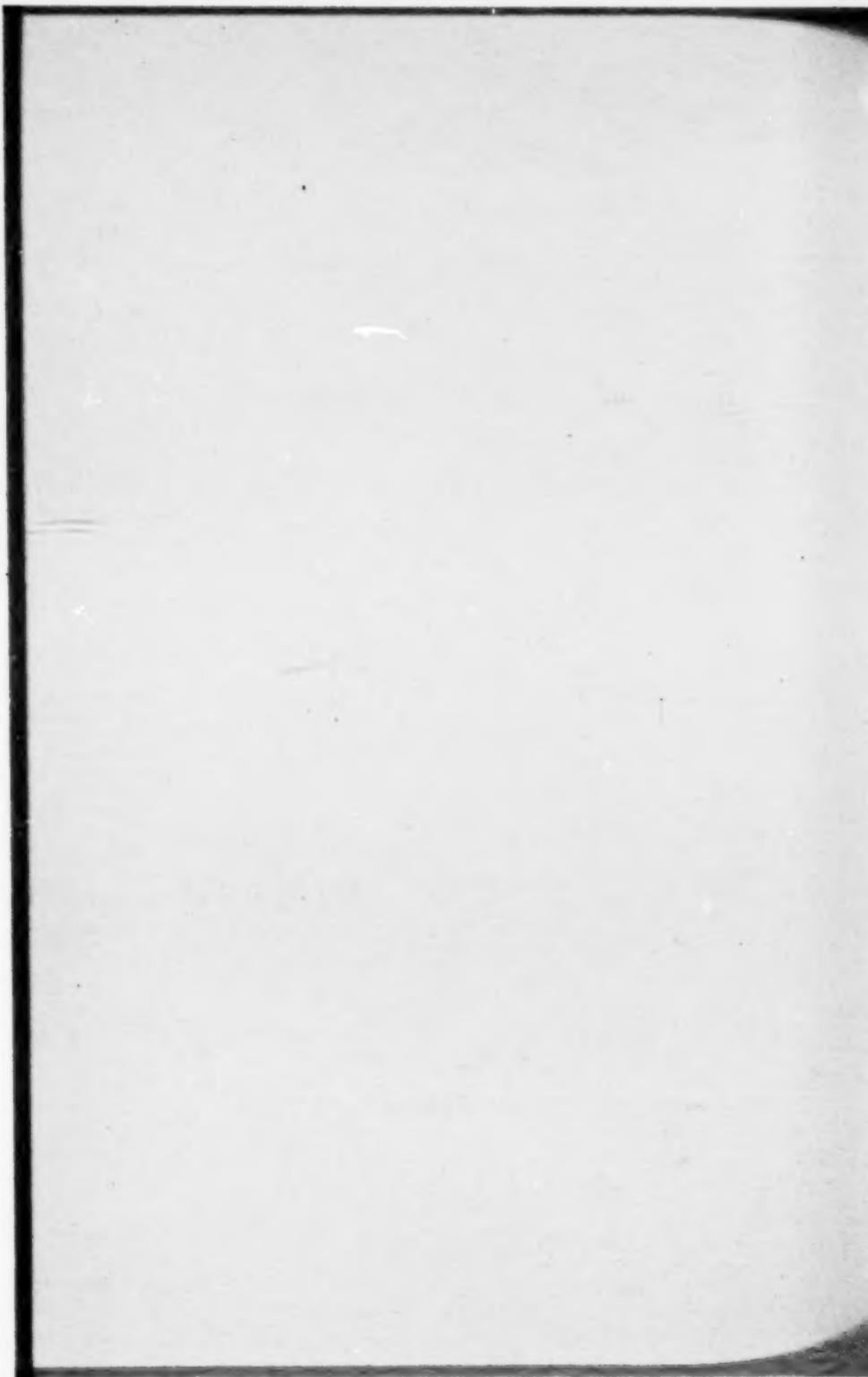
**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE TENTH CIRCUIT, AND BRIEF
IN SUPPORT THEREOF**

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MARCH, 1946.



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(Appendix:

Order Approving Sheriff's Sale of Real Estate;
Oklahoma Statutes, 1931, Sections 456, 457, 543, 546.)



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PETITION FOR WRIT OF CERTIORARI

May It Please the Court:

The petition of Bertha Florence Sabin and M. R. Sabin, petitioners, respectfully shows to this Honorable Court:

A.

Summary Statement of the Matter Involved

January 10, 1938, judgment was entered in the District Court of Tulsa County, State of Oklahoma, in favor of the Home Owners' Loan Corporation and against petitioners, foreclosing a mortgage on petitioners' home (R. 129).

Appeal from that judgment was perfected to the Supreme Court of the State of Oklahoma on August 8, 1938 [*Sabin v. Home Owners' Loan Corporation*, 187 Okla. 504, 105 Pac.(2d) 245].

Sale of petitioners' property having been had under an order of sale, and the Home Owners' Loan Corporation being the purchaser, the sale was confirmed by the District Court of Tulsa County, Oklahoma, on September 9, 1938 (R.25). This order of confirmation directed the Sheriff of Tulsa County, Oklahoma, to make and execute a deed to the purchaser, and that the clerk of said court issue a writ of assistance to the sheriff of said county directing him to put the purchaser in possession. These petitioners having given notice of appeal from said order of confirmation, the court extended the time for making and serving Case-Made, and, in accordance with the provisions of the statute (Section 546, Okla. Stat. 1931; Appendix V), allowed these petitioners twenty days within which to file a supersedeas bond in the sum of \$6,500.00.

On the same day, September 9, 1938, the sheriff executed and delivered to the Home Owners' Loan Corporation a deed to said property (R. 132).

A new appeal was immediately perfected by petitioners to the Supreme Court of Oklahoma from the order of confirmation (*Sabin v. H.O.L.C., supra*); and, petitioners believing the amount of supersedeas bond fixed by the lower court in its order of confirmation to be excessive, asked the appellate

court to fix the amount of such bond, and that court, on September 26, 1938, entered an order staying execution in the lower court until further order of the appellate court (R. 27, 198).

Notwithstanding, the H.O.L.C. had a writ of assistance issued by the lower court on December 3, 1938, which was recalled on December 15, 1938, by order of its attorney (R. 15, 28).

After some controversy in the appellate court as to the amount of supersedeas bond, it was finally fixed at \$2,000.00 (R. 203) and a bond was filed in that court and approved, on February 27, 1939 (R. 29).

An opinion was rendered by the Supreme Court of the State of Oklahoma on May 28, 1940 (*Sabin v. H.O.L.C., supra*) and on June 13, 1941, a purported mandate from the Supreme Court of the State of Oklahoma (R. 133), undated and claimed to be otherwise defective, was filed in the District Court of Tulsa County, Oklahoma.

On July 21, 1941, the Home Owners' Loan Corporation filed in the District Court of Tulsa County, Oklahoma, an application for an alias writ of assistance (R. 21), and thereupon a purported alias writ of assistance was issued by the clerk of said court (R. 157, 376, 384; Case No. 269, 1945 Term, this Court).

On July 24, 1941, petitioners filed in the Supreme Court of the State of Oklahoma, with leave of that court granted at a time when the Home Owners' Loan Corporation was represented by counsel there present, a petition to recall mandate

and grant a rehearing (R. 37, 38); notice of which was given to the Sheriff of Tulsa County, Oklahoma, on July 25, 1941 (R. 25).

On July 26, 1941, the sheriff executed the writ of assistance by removing all of petitioners' household furniture, personal effects, automobiles and other property, and placing the Home Owners' Loan Corporation in possession (R. 21).

Petitioners' petition to recall mandate and grant a rehearing was not finally denied by the Supreme Court of the State of Oklahoma until September 5, 1941 (R. 38), and a writ of certiorari was denied by this Court on February 5, 1942 (*Sabin v. H.O.L.C.*, Mem. 315 U.S. 800, 62 Sup. Ct. 625, 86 L. ed. 1201). No further proceedings have been had in the Supreme Court of the State of Oklahoma since that time, and no further mandate has issued from that court to the District Court of Tulsa County, Oklahoma.

This case was filed in the United States District Court for the Northern District of Oklahoma by appellants as plaintiffs against the Home Owners' Loan Corporation as defendant to quiet title to and recover possession of Lot 16, Block 6, Sunset Terrace Addition to the City of Tulsa, Oklahoma.

The petition (R. 2) alleges, in substance: That on August 30, 1934, plaintiffs made application for a loan on this property; that the property was appraised, unfinished, at \$13,500.00; that a note and mortgage of \$7,282.35 was executed, payable \$57.59 per month; that the first installment,

due on May 20, 1935, was paid, at which time it was agreed that the monthly payments would be suspended during the completion of the home by plaintiffs at their own cost, which they did at a cost of \$3,500; that about June 1, 1936, a written contract was entered into providing that plaintiffs would move out of the property, which they did, and an H.O.L.C. broker was to rent the same and apply the rents to the loan, which had become delinquent during the completion of the building; that, although the building had been completed, the Tulsa office of the H.O.L.C. on September 5, 1936, falsely reported to its Washington office that the same was unfinished and left open to inclement weather and that it was necessary to institute foreclosure action; that the plaintiffs did not learn of this false statement until after the trial of the foreclosure action, and were thereby prevented from defending on said ground, but that this constituted fraud and conspiracy and interference with the rehabilitation and beneficent purposes of the Government; that on September 6, 1936, the key was returned to the plaintiffs, and on the same day they received a "notice of foreclosure" from the H.O.L.C.; that on September 10, 1936, plaintiffs entered into a further agreement with the H.O.L.C. whereby they agreed to pay two monthly installments on their loan each month, plus an additional \$100.00, and whereby the H.O.L.C. agreed to suspend the foreclosure action; that plaintiffs made such payments promptly; that this agreement was reduced to writing on November 30, 1936; that although plaintiffs were paid up under said agreement until February 4, 1937, on January 13, 1937, the H.O.L.C.

reinstated the foreclosure action in violation of said agreement; that plaintiffs were compelled to go to trial on said case before a judge who was disqualified because he was a debtor in default to the H.O.L.C., which fact was not known by the plaintiffs until afterwards; and by reason thereof the judgment of foreclosure was and is *void*; that by reason of being overreached by the H.O.L.C. due to his being a debtor in default, said trial judge refused to permit the plaintiffs to offer evidence of the aforesaid extension agreement, which would have been a full defense to said action, and plaintiffs were thereby deprived of their property without due process of law, at a time when the H.O.L.C. knew that plaintiffs were not in default on said mortgage and committed fraud upon the court by concealing such facts; that the H.O.L.C. further, without knowledge at that time by plaintiffs, fraudulently concealed the fact that one of their agents had paid taxes against said property for the purpose of charging the same as grounds for default and thereafter collecting a refund of excess taxes so paid, putting the same in his pocket, and failing to give plaintiffs credit therefor, and on the trial of said foreclosure suit taking judgment against plaintiffs including such taxes which had already been refunded; that if these facts had been presented to the court they would have shown that the action was prematurely brought and same would have been necessarily dismissed; that the H.O.L.C. further conspired with the sheriff and thereby prevented one of plaintiff's witnesses for whom a subpoena had been issued from being served there-

with and being in court to testify (R. 204); that a decree of foreclosure was entered on January 10, 1938; an order of sale issued on July 18, 1938; a sale was had and the sale confirmed on September 9, 1938; notice of appeal from the order confirming sale given by plaintiffs, whereupon the court fixed the amount of *supersedeas* bond and gave plaintiffs twenty days in which to post the same; on that same day, and within said twenty days, a sheriff's deed was issued to the H.O.L.C., purporting to convey a property worth \$20,000.00 for only \$4,000.00, a price so unconscionable as to shock the conscience of the court; that plaintiffs considered the amount of *supersedeas* bond fixed by the District Court of Tulsa County, Oklahoma, exorbitant, and made application (within the twenty days) to the Supreme Court to modify the same, and said court ordered all proceedings stayed pending the hearing upon such application, notwithstanding which a writ of assistance was issued on December 3, 1938, but was withdrawn by the H.O.L.C. not served; the *supersedeas* bond was fixed by the Supreme Court at \$2,000.00 and same was given and approved by the clerk of that court; the appeal from said order confirming sale (as well as from the original judgment) was perfected, and on May 28, 1940, the Supreme Court issued an opinion affirming the judgment, reported in 187 Okla. 504, 105 Pac.(2d) 254; that plaintiffs were denied due process of law in that said case was decided by a "division" conference in which Justice Denver Davison participated, he being at that time disqualified because of having been employed as an

attorney for the H.O.L.C., upon learning which plaintiffs suggested to him and he stated that he would certify his disqualification; thereafter, on June 13, 1941, a purported mandate, not dated and issued in the name of one not the Chief Justice, was filed in the District Court of Tulsa County; thereupon an independent suit was filed in said district court to set aside said judgment because of the disqualification of the trial judge, which was dismissed without a hearing (R. 200, 201, 202); thereupon plaintiffs filed in the Supreme Court of Oklahoma a petition to recall the mandate and grant a rehearing, same being filed with leave of said Court endorsed on said petition (R. 34); notice of the filing thereof was given to the Sheriff of Tulsa County, of which the H.O.L.C. also had knowledge, but notwithstanding the H.O.L.C. caused an alias writ of assistance to issue and to be served by said sheriff whereby plaintiffs were evicted from their property; that thereafter the Supreme Court granted plaintiffs leave to file a supplemental petition to recall mandate and grant a rehearing. Copies of the order approving sheriff's sale (R. 25), order of the Supreme Court staying proceedings (R. 27), writ of assistance (R. 28), *supersedeas* bond (R. 29), mandate (R. 33), affidavit of Clerk of the Supreme Court as to the filing of the petition to recall mandate and grant a rehearing (R. 34), notice thereof to the sheriff (R. 35), are attached to the petition.

The response of the H.O.L.C. (R. 40) contains a general denial, specifically denies all allegations of fraud, admits

it foreclosed its mortgage and bought in the property and alleges that they thereafter sold same to George J. Overmyer and wife; specifically denies that plaintiffs continued to make payments and were paid ahead until February 4, 1937; denies it breached any agreement with plaintiffs; denies the disqualification of the judge, and denies that he was overreached; denies that plaintiffs had a good and meritorious defense to the foreclosure action, and denies that it violated the letter or spirit of the H.O.L.C. Act; disclaims knowledge as to whether any of its agents ever collected any tax refunds belonging to plaintiffs, but says it gave plaintiffs credit for every payment made; denies that the judgment was void for any reason, or that the mandate was void; it says that the matters presented are moot, because the property has been sold to George J. Overmyer and wife, who purchased same in good faith; further that plaintiffs have not tendered payment of their indebtedness; further that the matters presented were presented to the Supreme Court of Oklahoma, and before the Supreme Court of the United States on petition for a writ of *certiorari*, and the judgment therein is *res adjudicata*; and further says that plaintiffs are barred by the statutes of limitations. *By way of cross petition*, the H.O.L.C. alleges the foreclosure suit, appearance therein of plaintiffs here, judgment of foreclosure, appeal to the Supreme Court of Oklahoma, affirmance of the judgment, petition to the Supreme Court of the United States for *certiorari*, denial thereof, issuance of mandate by the Supreme Court of Oklahoma, and that "said property was thereafter duly sold in

the manner provided by law—and bought in by this defendant" and resold by it to the Overmyers, who are innocent purchasers for value. It is alleged that a damage action based on the wrongful issuance and attempted service of the original writ of assistance constitutes *res adjudicata*; also that the judgment in another damage action (Case No. 3063 in this Court) constitutes *res adjudicata*. Attached are copies of the petition in the foreclosure case (R. 56); answer of these plaintiffs in said action (R. 63); copy of Supreme Court docket down to November 26, 1940 (R. 68); amended petition of these plaintiffs in the damage action based on the original writ of assistance (*supra*) (R. 70); petition to vacate judgment in an action which was dismissed without trial (R. 85).

To said response plaintiffs filed a reply (R. 92) alleging, among other things, that the Overmyers could not be innocent purchasers for value, being *lis pendens* purchasers; that the pretended sale to them by H.O.L.C. was not an actual sale but merely a transfer of title as a subterfuge; that said deed was executed and delivered while the case was still pending in the Supreme Court of Oklahoma. They make formal tender of any sums found due to H.O.L.C. They further allege that the aforesaid foreclosure suit case is still pending in the Supreme Court of Oklahoma at this time, no order having been made in that court after the denial of plaintiffs' petition for writ of certiorari in the Supreme Court of the United States (316 U. S. 713). Attached are copies of an order made in the Supreme Court of Oklahoma on September 5, 1941 (R. 122),

and of the docket entries in that court supplementing those presented by the H.O.L.C. down to date (R. 123).

Thereupon the H.O.L.C. filed a motion for summary judgment (R. 124), setting up that there is no issue of fact involved; that the question of ownership of said property has been finally adjudicated by the Supreme Court of Oklahoma. Attached is an affidavit stating that the claim of plaintiffs has been finally adjudicated; alleging the judgment in the foreclosure action, order of sale, confirmation thereof, and the issuance of the sheriff's deed on the same day of the confirmation, appeal of said case, affirmance, application for *certiorari*, issuance of mandate; also the judgment in civil action 1079 (Case No. 3063 in this Court). Attached are copies of the foreclosure judgment (R. 129), the sheriff's deed (R. 132), order confirming sale (R. 25), and the mandate (R. 135).

Plaintiffs filed a response to said motion (R. 137) pointing out in detail the issues of fact raised by the pleadings, to which reference will be made in the argument. Specifically it is pointed out that the "extension agreement" as alleged in their petition was made pursuant to Section 4(d) of the H.O.L.C. Act, and that the same was complied with by plaintiffs, and exhibits showing the payments made in compliance therewith are attached, (R. 165-9), (R. 63, 64).

Then, following a motion to dismiss by the H.O.L.C. (R. 170), leave was granted to make George J. Overmyer and Brenda E. Overmyer parties defendant (R. 173), which

was done by the filing of an amendment to plaintiffs' petition (R. 174). Said defendants filed a response and cross-petition (R. 177) in which they also allege the finality of the foreclosure judgment, as well as *res adjudicata* by reason of Case No. 3063 (in this Court), and the statute of limitations. They likewise filed a motion for summary judgment (R. 175) upon the same grounds.

These motions for summary judgment were sustained (R. 180), and plaintiffs filed their motion to vacate such order and for a rehearing (R. 182). In this particular attention is again called to the disqualification of the trial judge in the foreclosure action, and the over-reaching of him by the H.O.L.C.; which is supported by a statement dated September 18, 1944, (R. 196) made and signed by said judge, stating, among other things:

"That I would not have permitted the judgment to be entered in this cause had these facts and conditions of said alleged Extension Agreement and alleged payments made, in accordance with said alleged agreement, been properly presented to me."

Also attached is a copy of the order of the Supreme Court of Oklahoma (R. 198) staying proceedings in the foreclosure suit pending determination on the question of the amount of *supersedeas*; another similar order (R. 199) further staying execution, and proposing amount of "*stay bond to be executed to stay the judgment and order of confirmation of Sheriff's Sale as is here, on appeal;*" an order of the District Court of Tulsa County dated August 14, 1941, in which it

is recognized that said case was still in the Supreme Court on that date (R. 200, 201, 202); and *subpoena Duces-Tecum* (R. 204) showing witnesses were prevented from testifying for Sabins at foreclosure trial; and *subpoena* (R. 205) issued for material "witness" who was prevented by fraud from being present at foreclosure trial to testify for Sabins (R. 12, 13); whereby Sabins were deprived of their opportunity to submit their defense (R. 9-13, 206); and (R. 203) Supreme Court Order finally determining size of "bond" and other exhibits to which reference will be made in the argument.

This motion for rehearing was overruled (R. 209A).

B.**Basis of Jurisdiction of This Court**

Petitioners appealed from the judgment of the District Court of the United States for the Northern District of Oklahoma to the Circuit Court of Appeals for the Tenth Circuit, and that Court rendered judgment affirming the District Court on October 30, 1945 (R. 223). The opinion of the Circuit Court of Appeals (R. 220) is reported in 151 F (2) 541.

Petition for rehearing was filed by petitioners and was denied by the Circuit Court on November 28, 1945 (R. 435).

On February 5, 1946, within the three months allowed by statute (Title 28, Section 350, U. S. C. A.) for filing petition of *certiorari* in this Court, Justice Rutledge of this Court extended the time for filing such petition until March 15,

1946, and this petition is presented and filed within such extended time.

Jurisdiction is conferred upon this Court by Title 28, Section 347(a), U.S.C.A. (Jud. Code, Sec. 240, as amended) to require by *certiorari* that said cause be certified to this Court by the Circuit Court of Appeals for the Tenth Circuit for determination by this Court.

C.

Questions Presented

1. Whether petitioners were deprived of due process of law by the issuance of the sheriff's deed at a time when further execution was stayed by the order confirming sale.

2. Whether petitioners were denied due process of law by reason of the disqualification of the trial judge, fraud, and over-riding, whereby they were prevented from fully exhibiting their case and witnesses to the Court, thereby rendering the judgment of foreclosure void.

3. Whether the privileges of petitioners have been abridged and petitioner denied due process of law by the Circuit Court of Appeals holding to be *res adjudicata* a decision of the District Court of Tulsa County, Oklahoma, and the Supreme Court of the State of Oklahoma, whereby petitioners were denied their rights under Section 4(d) of the H.O.L.C. Act of 1933 (Title 12, Section 1463, U.S.C.A.) to prove as a defense to the foreclosure action brought in that Court by the H.O.L.C. that an extension agreement had been entered into.

D.**Reasons Relied On for the Allowance of the Writ**

The Circuit Court of Appeals held *Sabin v. H.O.L.C.*, 147 F (2) 653 (R. 404) that further execution under the order confirming sale was stayed for a period of at least twenty days, as provided by the order (Appendix I-III), under the provisions of Title 12, Sec. 971, Okla. Stat. 1941 (Section 546, Okla. Stat. 1931, Appendix V); but at the same time held that the sheriff's deed executed and delivered during that twenty-day stay period was not thereby rendered void. This decision decides an important question of local law in a way probably in conflict with applicable local decisions, particularly the decision in *Goldstern v. Gavin*, 187 Okla. 338, 102 Pac. (2d) 582, in which case the principle was laid down that title to property remained in the defendant until confirmation of sale; also the decision in *Fariss v. Deming Investment Co.*, 5 Okla. 496, 50 Pac. 130, in which it was held that supersedeas cannot be ignored or an execution issued as long as it remains on record until its effect has been tested by direct attack; also the decision in *Brauns v. Donahoe*, 127 Okla. 33, 259 Pac. 541, which case holds that a *supersedeas* bond given to stay execution on an order confirming sale is for the purpose of covering damages, among other damages, caused by reason of delay in obtaining sheriff's deed. It likewise conflicts with the great weight of authority in a question of general law, particularly the decision in *Board of Regents v. Linscott*, 30 Kan. 241, 1 Pac. 81, 91, holding that a sheriff's deed is required to vest title, and

Anthony v. Janssen, 183 Cal. 329, 191 Pac. 538, and *In re Worley*, 50 Fed. Supp. 611, which cases hold that a sheriff is without lawful power or authority to execute a deed at a time when an order of confirmation has been stayed. The decision therefore operates to sanction the deprivation of petitioners' property without due process of law.

The Circuit Court of Appeals held that by the Supreme Court of the State of Oklahoma granting leave to petitioners to file in that Court a petition to recall mandate and grant a rehearing, and considering such petition, jurisdiction of the case was not re-assumed by that Court so as to deprive the District Court of Tulsa County, Oklahoma, of jurisdiction to proceed with an execution in the case at the same time such petition was being considered in the appellate Court (R. 405). This decision of the Circuit Court of Appeals is contrary to the decision of this Court in *Chicago G. W. R. Co. v. Basham*, 249 U. S. 164, 63 L. ed. 534, 39 Sup. Ct. Rep. 213, in which case this Court laid down the principle that while a judgment was being considered by a state court of last resort upon a petition for rehearing the litigation is not brought to a conclusion in that Court until such petition is disposed of by it. The decision is likewise in conflict with the decision of Circuit Court of Appeals for the Ninth Circuit in *Warren v. Terr. of Hawaii*, 119 Fed. (2d) 936, holding that the entertainment by a court of appeals having power to recall a mandate but not having recalled it, of a petition for rehearing, amounts to a re-assumption of

jurisdiction of the case by the appellate court. The decision likewise probably conflicts with the decision of the local court in *Ehrig v. Adams*, 67 Okla. 157, 169 Pac. 645, in which case the Supreme Court of Oklahoma recalled a mandate, granted a rehearing, and rendered an opinion directly contrary to its original opinion; and with the decision in *Egbert v. St. Louis & S. F. R. Co.*, 50 Okla. 623, 151 Pac. 228, holding that no two courts can have jurisdiction of the same cause of action at the same time. It likewise conflicts with the great weight of authority in a question of general law, particularly the cases cited in the *Egbert case, supra*, to the same effect as held in that case. The decision therefore operates to sanction the deprivation of petitioners' property without due process of law.

The Circuit Court of Appeals also held that the allegations of the petition as to disqualification of the trial judge, overriding, and fraud, were flimsy, transparent, gauzy, and insufficient to state a justiciable controversy requiring the submission thereof to trial. This decision is contrary to the decisions of this Court in *Arrowsmith v. Gleason*, 129 U. S. 86, 32 L.Ed. 630, holding that if a case of fraud be established, equity will set aside all transactions founded upon it, by whatever machinery or contrivances they may have been effected. It is also contrary to the controlling decisions of the State of Oklahoma, in *Son v. Linebaugh*, 101 Okla. 291, 225 P. 686, *State v. Freeman*, 102 Okla. 291, 229 P. 296, *London v. Ogden*, 130 Okla. 189, 265 P. 139, *State v. Walden*, 142

Oklahoma, 115, 285 P. 951, *Coker v. Crump*, 142 Okla. 150, 286 P. 321, and other cases, holding, under authority of Article II, Section 6, of the Constitution of Oklahoma that "right and justice shall be administered without sale, denial, delay or prejudice"; also rule in *U. S. v. Throckmorton*, 98 U. S. 61.

The Circuit Court of Appeals also held that the decision of the Supreme Court of Oklahoma in *Sabin v. H.O.L.C.*, 105 Pac. (2d) 245, and *Sabin v. H.O.L.C.* (C.C.A. 10), 147 Fed. (2d) 653, were *res adjudicata* upon the validity of the foreclosure sale in question. This decision denies the right of petitioners to prove that they had a complete defense to the foreclosure action by reason of an extension agreement entered into under the provisions of Title 12, Section 1463, U.S.C.A.; and is also based upon the said decision of the Supreme Court of Oklahoma which is contrary to the decision of that Court in *McConnell, Rebold et al v. H.O.L.C.*, 190 Okla. 190, 121 Pac. (2d) 1001, wherein that Court held that extensions of time were in a sense obligatory and that the H.O.L.C. was vested with discretion to grant additional extensions of time.

PRAYER FOR WRIT

Wherefore, your petitioners respectfully pray that a writ of *certiorari* be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Tenth Circuit, commanding that Court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and

complete transcript of the record and all proceedings in the case numbered and entitled on its docket, "No. 3158, *Bertha Florence Sabin and M. R. Sabin v. Home Owners' Loan Corporation*, a corporation, George J. Overmyer and Brenda E. Overmyer, Appellees;" and that said judgment of the United States Circuit Court of Appeals for the Tenth Circuit may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

BERTHA FLORENCE SABIN AND
M. R. SABIN,
Petitioners,

HERBERT K. HYDE,
Attorney for Petitioners.